STATE OF MAINE

MAINE SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

Law Court Docket No. Cum-20-181

AVANGRID NETWORKS, INC.,

Plaintiff-Appellant,

v.

MATTHEW DUNLAP,
in his official capacity as Secretary of State for the State of Maine,

Defendant-Appellee,

v.

MAINERS FOR LOCAL POWER, *et al*.,

Intervenors.

ON APPEAL FROM
THE CUMBERLAND COUNTY SUPERIOR COURT

BRIEF OF INTERVENORS MAINERS FOR LOCAL POWER AND NINE MAINE VOTERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Cases—continued

Cases—continued

Cases—continued

Cases—continued

Cases—continued

Statutes and Constitutions

Statutes and Constitutions—continued

Legislative Documents

Other Authorities

Other Authorities—continued

INTRODUCTION

This case is about the right of citizens to engage in participatory democracy.

Central Maine Power (CMP) seeks to construct one of the largest public utility projects in state history. The 145-mile CMP Corridor would clear-cut more than 1,500 acres of forestland, destroy hundreds of wetlands, and invade several wildlife habitats—all to transmit power from Quebec to customers in Massachusetts.

More than 66,000 Maine voters signed petitions requesting a ballot Initiative to address whether this transmission line in fact serves the "public interest." The Secretary of State validated the Initiative, an action this Court recently affirmed.

CMP's parent company, Avangrid, now seeks a last-minute injunction to bar Maine citizens from exercising their democratic rights. The Superior Court correctly dismissed Avangrid's claims, finding that Avangrid (or CMP) can bring suit only after the election, in the event that the Initiative carries.

As the Superior Court held, *see* (A. 19), after a petition has been validated, the Maine Constitution directs that, unless enacted, it "shall be submitted to the electors." Me. Const. art. IV, pt. 3, § 18, cl. 2. This secures to the People an absolute right to vote on validated initiatives. That is so regardless of whether the initiative is substantively constitutional, a conclusion this Court (and its Justices) has repeatedly reached. The voters' core rights thus bar the relief that Avangrid requests.

Additionally, as the Superior Court further found, Avangrid's "substantive challenges" are "not ripe for review because the initiative might not pass and might never become effective." (A. 21.) It is for this same reason that courts do not assess the constitutionality of legislation being debated by the Legislature. To the extent

any pre-election challenges are cognizable, it is only those that address limitations to the ballot initiative process *itself*. That does not describe this case, which is a challenge to the Initiative's substantive constitutionality.

If the Court reaches the merits, the Initiative is constitutional. First, the people, the ultimate sovereign, may accomplish by ballot initiative any end achievable by legislation. Second, in Maine, utilities regulation is a legislative function. Case law and statute both establish that the Legislature may, through legislation, overrule the PUC's orders. Indeed, the Legislature did so last year with the Aqua Ventus Resolve. Putting these points together, the Initiative is plainly constitutional. Avangrid's complex arguments, which disregard these basic principles, each fail.

STATEMENT OF FACTS

Factual Background

1. The PUC "issued a decision granting a certificate of public convenience and necessity for construction and operation of [the CMP Corridor] for the provision of hydroelectric power from Québec to New England via a 145-mile energy corridor located in Maine." *Reed v. Sec'y of State*, 2020 ME 57, ¶ 2, ___ A.3d ___. The PUC's action rested on its determination that the CMP Corridor "is in the public interest" (A. 43.) a conclusion reached even though the PUC "found that the transmission line would have an adverse impact on scenic and recreational values; tourism; and local economies." *NextEra Energy Res., LLC v. Maine Pub. Utils. Comm'n*, 2020 ME 34, ¶ 31, 227 A.3d 1117.

In response, more than 66,000 Maine citizens supported the Initiative, which will put to a popular vote whether the CMP Corridor is, in fact, "in the public in-

terest." *Reed*, 2020 ME 57, ¶ 2, ___ A.3d ___. The Secretary of State "concluded that the initiative petition was valid," *id*. ¶ 10, and the Court upheld that action, *id*. ¶ 24.

Intervenors here include nine Maine Voters who wish to exercise their constitutionally protected right to vote on the Initiative:

- State Senator David Woodsome does not "believe that CMP" has "the public interest in mind in the development of this project." (A. 177.) He believes that this "is an enormously important issue that should be addressed by Maine voters," he signed the petition in support of the Initiative, and he intends to vote in favor of it in November. (A. 177.)
- State Representative Janice Cooper believes that the CMP Corridor "would cut across Maine to deliver power from Canada to energy consumers in Massachusetts," and would "cause irreparable harm to our state." (A. 171.) She intends to vote for the Initiative in November. (A. 171.)
- Jesse and Kasey Lupo own a camp along the Moxie River, directly abutting land on which CMP intends to build the Corridor. (A. 172, 174.) If built, the "financial value" of their land "will decline," and their "ability to enjoy the natural area will be permanently adversely affected." (A. 173, 175.) They intend to vote for the Initiative in November. (A. 173, 175.)[1]

2. Independent of the PUC certificate at issue in the Initiative, CMP has yet to obtain several other permits, each of which is essential to operation of the transmission line. These include: 1) a Presidential Permit from the Department of Energy, 2) a Clean Water Act Permit under Section 10 of the Rivers and Harbors Act from the U.S. Army Corps of Engineers, 3) a submerged land and public reserve leases from the Maine Department of Agriculture, Conservation and Forestry, 4) permits from the Maine Department of Transportation, and 5) rezoning approvals and local permits, from *twenty* municipalities. Ultimately, Central Maine

[1] The nine Maine citizens who have intervened in this action to protect their right to vote on the Initiative are Rep. Janice Cooper, Sheryl Harth, Jesse Lupo, Kasey Lupo, Tiffany Maiuri, Matthew Smith, Jodi Savage-Wilson, Sen. David Woodsome, and David Yuill.

Power does not anticipate completing these approvals until at least 2021.[2]

Procedural History

Avangrid, the corporate parent to CMP, filed this lawsuit on May 12, 2020, seeking to enjoin the Secretary from placing the Initiative on the ballot.

On June 29, 2020, the Superior Court dismissed the Complaint, concluding that Avangrid's claims are premature. In that court's view, this "issue is broader than ripeness." (A. 18.) "[T]he Maine Constitution" "indicate[s] that pre-election review is not available to consider challenges to the validity of proposed initiative legislation if it were to be enacted." (A. 19.) In particular, "Article IV, Pt. 3 § 18(2) of the Maine Constitution states that the legislation proposed by initiative, unless enacted without change by the Legislature, 'shall be submitted to the electors.'" (A. 19.) "On several occasions Justices of the Supreme Judicial Court have expressed the view that this requires placement of an initiative on the ballot regardless of whether the proposed initiative legislation would be unconstitutional if enacted." (A. 19.) This conclusion is "[c]onsistent with the principle that the purpose of the direct initiative is the encouragement of participatory democracy." (A. 19.)

Avangrid's claims are not cognizable because they do "not present an instance where a procedure specified in the Constitution is inconsistent with the use of the initiative process." (A. 21.) Rather, they are "substantive challenges," which "are not ripe for review because the initiative might not pass and might never be-

[2] *See Cent. Me. Power Co.*, Request for a Certificate of Public Convenience and Necessity for the Construction of the New England Clean Energy Connect (NECEC) Transmission Project, No. 2017-00232, App., Vol. I at18-27 (Me. P.U.C. Sept. 27, 2017); *Cent. Me. Power Co.*, Request for a Certificate of Public Convenience and Necessity for the Construction of the New England Clean Energy Connect (NECEC) Transmission Project, No. 2017-00232, Biannual Progress Report on Permitting, Development and Construction of the NECEC at 2 (Me. P.U.C. Jan. 2, 2020).

come law." (A. 21.) Indeed, "[a]s counsel for Avangrid conceded at oral argument, Avangrid's argument that the proposed initiative is not a proper exercise of legislative power merges with its claim that, if enacted, the initiative would violate the separation of powers." (A. 22.) Ultimately, "[t]his is a substantive challenge to the validity of the initiative and must be deferred until after the election." (A. 22.)

The court concluded that addressing the merits of Avangrid's claims "would resemble an advisory opinion." (A. 24.) Thus, "plaintiffs' substantive challenges to the validity of the proposed initiative may not be reviewed at this time and must be reserved for future litigation if the proposed initiative is enacted." (A. 24.)

STATEMENT OF THE ISSUES

Each of four different issues would conclusively resolve this case:

- Section 18's use of "shall": Whether Article IV, Part 3rd of the Maine Constitution—which provides that a validated written petition "shall be submitted to the electors"—bars the injunctive and declaratory relief that Avangrid requests.
- Ripeness: Whether Avangrid's claims challenging the substantive constitutionality of the Initiative—claims that Avangrid would raise even if the Legislature enacted the legislation—are unripe prior to the election.
- Section 22's time limit: Whether the 100-day limitation on challenges to the validity of written petitions in Article IV, Part 3rd of the Maine Constitution runs parallel to the full scope of cognizable pre-election challenges.
- Necessary parties are absent: Whether necessary parties are absent.

If the Court reaches the merits of Avangrid's claims, the central issue is:

- The Legislature's authority to direct the PUC: Whether the Legislature may direct the PUC to take specific actions—an authority this Court has held the Legislature possesses, an authority that is express in Maine statute, and an authority that the Legislature exercised just last year with the Aqua Ventus Resolve.

STANDARD OF REVIEW

The Court reviews the "ultimate determination not to issue a declaratory

judgment or provide injunctive relief for an abuse of discretion." *LeGrand v. York Cty. Judge of Prob.*, 2017 ME 167, ¶ 31, 168 A.3d 783. It "review[s] conclusions of law, including issues of constitutional interpretation, de novo." *Id*.

SUMMARY OF ARGUMENT

I. The Superior Court correctly held that Avangrid's complaint is premature.

A. As the Superior Court concluded, this Court has explicitly held that Article IV, Part 3rd, Section 18 of the Maine Constitution provides citizens the right to vote on a validated Initiative, regardless of whether the Initiative is constitutional. This alone bars Avangrid's request for relief.

B. As the Superior Court further concluded, Avangrid's claims are not ripe, because the Initiative is, at present, a mere proposal, and may never be enacted. *See Wagner v. Sec'y of State*, 663 A.2d 564, 566 (Me. 1995). To the extent any challenges to a ballot initiative are cognizable pre-election, it is those that address limits specific to the ballot initiative process itself. Claims that instead go to the legislative authority generally—that is, claims that would be brought even if the Legislature itself adopted the law—must wait until after the election. And those are precisely the sort of claims that Avangrid asserts here.

C. If, contrary to our principal argument, Avangrid's claims were cognizable pre-election, they are barred by the plain text of Article IV, Part 3rd, Section 22. Because Section 18 mandates that all validated petitions go to the electors, pre-election challenges are limited to those that contest the petition's "validity." Section 22 creates procedural requirements for such claims, to preclude the sort of late-breaking claim at issue here. This plain-text reading of Section 22 presents a

simple way for the Court to resolve this case: If Sections 18 and 22 work in parallel, then Avangrid's Complaint necessarily must be dismissed, as either Avangrid's claims go to the validity of the written petition (and are barred by Section 22), or they do not (and Section 18 compels an election). The Court need not decide more.

D. Necessary parties are absent. Avangrid asserts that, if the Initiative is enacted, the PUC's rescission of the CPCN issued to CMP would be unconstitutional. But neither the PUC nor CMP are present to litigate their hypothetical rights.

II. If the Court reaches the issue, the initiative is constitutional.

A. Absent a specific restriction in the Constitution, the people exercise plenary legislative authority and may enact any law enactable by the Legislature. And the Legislature has the power to direct the PUC to take specific actions in individual cases. That is because the PUC's authority stems from a delegation of legislative power. Since the PUC serves as agent at the Legislature's pleasure, the Legislature may remove discretion in individual cases and direct specific action. The Court held so expressly in *Auburn Water Dist. v. Pub. Utils. Comm'n*, 163 A.2d 743, 744 (Me. 1960). This authority is hard-wired into statute, 35-A M.R.S. § 1323. And the Legislature exercised this power last year. Resolves 2019, ch. 87.

B. Avangrid's counter-arguments each fail to persuade.

1. Because the Legislature has the specific power to govern PUC determinations, the Initiative would not usurp the Executive's authority. Beyond the robust law specific to Maine's PUC, basic principles of administrative law establish the authority of a legislature to direct an agency.

2. The Initiative does not usurp judicial authority. Legislatures may not in-

validate prior judicial judgments that resolve fixed, private rights. But three necessary ingredients are missing to such a claim here, each of which is independently fatal to Avangrid's argument. First, the rights underlying a CPCN are not fixed; because the legal structure—designed to promote the public's interest in utility regulation—allows the PUC to revise past orders, the rights at issue are not sufficiently final to trigger this doctrine. Second, a CPCN addresses *public* rights, to which this doctrine is inapplicable. Third, the Initiative (which orders the PUC to exercise its discretion *differently*) does not invalidate the judicial judgment (which held only that the PUC's exercise of discretion was *reasonable*).

3. The Initiative is not an impermissible special law. Because the Legislature may adopt special laws, so too may the people. And nothing in the Initiative runs afoul of the Constitution's special legislation clause.

ARGUMENT

I. The Superior Court Correctly Concluded That Avangrid's Challenges To The Initiative Must Follow The Election.

A. The Maine Constitution—which provides citizens the right to vote on a validated initiative—bars the relief that Avangrid requests.

Because the Initiative has been validated, *see Reed*, 2020 ME 57, ¶ 1, ___ A.3d ___, citizens possess an absolute right to vote on it. The relief that Avangrid requests, an injunction removing the Initiative from the ballot, would thus violate the constitutional rights of all Maine voters, including the Maine Voter intervenors.

1. If a sufficient number of Maine citizens support a ballot initiative, and the Legislature does not enact it, the measure "*shall* be submitted to the electors." Me. Const. art. IV, pt. 3, § 18, cl. 2 (emphasis added). Citing this provision, the Court has previously held that, when "the Legislature has not enacted the initiative

without change, it *must* be referred to the electors." *Wagner*, 663 A.2d at 566 n.3 (emphasis added).

Based on both the constitutional text and *Wagner*'s footnote 3, Justices of this Court have expressly identified the obligation to place a validated initiative on the ballot. In 1996, the Justices found that there was a solemn occasion to issue an advisory opinion under Article VI, Section 3. Four Justices concluded that part of the initiative "would not appear to be constitutional." *Opinion of the Justices*, 673 A.2d 693, 697 (Me. 1996). Next, the Justices addressed Question Three:

> [M]ust the Legislature submit an initiated bill without any amendment to the voters at referendum, notwithstanding the fact that the bill is unconstitutional as written? The answer is ***clearly in the affirmative***. The Maine Constitution provides that:
>
> > The [initiated bill] thus proposed, unless enacted without changed by the Legislature . . . , shall be submitted to the electors . . . .
>
> Me. Const. art. IV, pt. 3, § 18, cls. 2 (1985). The word shall is a ***mandatory directive*** to submit the question to referendum. The clause contains ***no exceptions*** to such a directive.

Id. (emphasis added). In holding that this answer was "clear[]" and without "exceptions," the Justices understood *Wagner*'s footnote 3 to compel this result. *Id*.

On this point, all seven Justices were unanimous. Justices Glassman, Clifford, and Lipez "agree[d]" that Section 18 "requires that the initiated bill be submitted to the voters regardless of our opinion as to its constitutional validity." *Id*. at 698. These Justices, however, were of the view that—even in the constitutional framework permitting an advisory opinion—it was still preferable "to allow the electorate to express its view prior to rendering our opinion on the measure." *Id*. at 699. Deciding questions earlier, these Justices explained, may "interfere with . . . the people's right of franchise by offering an opinion on the enforceability of an initiated measure before the electorate has expressed its view." *Id*.

These issues resurfaced in 2004, when the Justices again recognized a solemn occasion to offer an advisory opinion. *Opinion of the Justices*, 2004 ME 54, 850 A.2d 1145. Justices Clifford, Rudman, and Alexander explained that, per the text of Section 18, an "initiated bill itself may not be withdrawn from the ballot or amended in any way, even if a constitutional infirmity in the initiated bill should be identified." *Id*. ¶ 37. These Justices expressed concern with "interfering with the political process and the people's right of franchise" by assessing its constitutionality "before the electorate has expressed its view." *Id*. ¶ 38. For this reason, these Justices would have declined to even issue an *advisory* opinion. *Id*. ¶ 40.

Notably, the four Justices who issued the advisory opinion—and who found certain aspects of the Initiative unconstitutional, *id*. ¶ 18—did not disagree with these views. In fact, the Initiative *did* proceed to the ballot, notwithstanding the advisory opinion. *See* Maine 2004 ballot measures, Question 1.

In all, "the right of the people to initiate and seek to enact legislation is an absolute right." *McGee v. Sec'y of State*, 2006 ME 50, ¶ 21, 896 A.2d 933; *see also Farris ex rel. Dorsky v. Goss*, 60 A.2d 908, 911 (Me. 1948) ("The right of the people, as provided by Article XXXI of the constitution, to enact legislation . . . is an absolute one."). In other words, "section 18 cannot be said merely to *permit* the direct initiative of legislation upon certain conditions. Rather, it reserves to the people the *right* to legislate by direct initiative if the constitutional conditions are satisfied." *McGee*, 2006 ME 50, ¶ 25, 896 A.2d 933.

The ballot-initiative right also provides an important mechanism for the citizens to speak, authoritatively identifying the will of the people. That is, "[t]he

broad purpose of the direct initiative is the encouragement of participatory democracy." *Wagner*, 663 A.2d at 566 (quoting *Allen v. Quinn*, 459 A.2d 1098, 1102 (Me. 1983)). These rights exist independent of an initiative's underlying validity:

> Grassroots democracy, exercised by initiative, is not always an efficient process; however, there are clear benefits to allowing the public to vote on an initiative, even though its validity may be questioned if it passes. In a democracy, the process itself is often as valuable as the result. A vote to enact legislation expresses more than a current whim of the people; it expresses the voters' preferred rule of governance.

Winkle v. City of Tucson, 949 P.2d 502, 507 (Ariz. 1997) (en banc).[3] As this Court has said, "[t]he potential invalidity . . . of an initiative petition . . . is not a sufficient reason to pre-empt the petition process itself or to bar the discussion of the issues raised in the petition." *Wyman v. Sec'y of State*, 625 A.2d 307, 311 (Me. 1993).[4]

Whether the CMP Corridor is in the "public interest" (A. 43.) is an issue uniquely suited to public referendum. Even if the Initiative were later invalidated, the people's vote might motivate the PUC to reconsider its decision or cause the Legislature to adopt different legislation to block the CMP Corridor. The ballot initiative no doubt provides "the people a powerful tool for shaping and creating legislation." *McGee*, ME 50, ¶ 24, 896 A.2d 933. The Legislature often—as it did with ranked-choice voting—responds to the people's vote with new legislation. In all, it would be profoundly antidemocratic to deny citizens a vote on the Initiative.

2. While this constitutional obligation is itself dispositive, the factors relevant to a permanent injunction also show why relief is improper. *See Windham*

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[3] "If this process is deemed a waste of taxpayers' time or money, then the laws governing initiatives may be altered by legislative process, not by judicial decision." *Winkle*, 949 P.2d at 507.

[4] *Cf. Berent v. City of Iowa City*, 738 N.W.2d 193, 204 (Iowa 2007) ("[B]ecause measures are often used to send a message to elected representatives, preelection review even of measures that are subsequently found invalid by a court may unduly infringe on free speech values."); *Winkle*, 949 P.2d at 504 ("As a true reflection of democratic principles, . . . citizens are not precluded from legislating on any issue, even though the legislation might conflict with the Arizona Constitution or state law.").

Land Tr. v. Jeffords, 2009 ME 29, ¶ 41, 967 A.2d 690 (identifying permanent injunction elements). The public interest consideration is overwhelming, as the public has an *absolute* right to go to the polls. Denying that right would inflict irreparable injury on the public at large, including Intervenors Maine Voters. That interest is *mandatory*, and thus it overrides other considerations.

For its part, Avangrid points to no practical harm it would suffer if its claims are resolved after the election. If adopted in the November ballot, it would not become effective, at earliest, until December 24, 2020. *See* (Sec'y Super. Ct. Br. 20 n.15.) And even then, nothing is imminent, as CMP lacks several permits necessary to operate the CMP Corridor. *See supra* pp. 3-4. Avangrid cannot tether harm to a *proposed*—but not yet enacted—law. Were it otherwise, courts would be inundated with challenges to legislative *proposals* debated by the Legislature.

B. Avangrid's claims—which challenge whether the Initiative exceeds the general legislative authority—are not ripe pre-election.

Prior to an election, claims challenging a ballot initiative—if allowed at all—must be unique to the ballot initiative vehicle. By contrast, general substantive challenges to an initiative must come after the election.

There is a straightforward way to conduct this analysis. Imagine that the law at issue were enacted by the Legislature, rather than by the people. If the same claim is available, it is a general substantive challenge and must await the election. By contrast, if the claim would be obviated by the fact of the Legislature's action, it is a challenge to the ballot initiative process itself.

Here, as the Superior Court held, this is a general substantive challenge. If the Legislature enacted this same law, Avangrid would press the same claims.

1. Just as a court may not adjudicate the validity of proposed legislation before the Legislature acts, a court may not address the substantive validity of a ballot initiative prior to its passage. (A. 19-21.) A challenge to "the future effect, enforceability, and constitutionality of the initiative if enacted" is "not ripe for judicial review" until *after* the election. *Wagner*, 663 A.2d at 567.

A ballot initiative may not succeed at the polls and "may never become effective." *Id.* A constitutional challenge to a *proposed* but un-enacted law thus does not present the kind of "concrete, certain, or immediate legal problem" that the ripeness requirement demands. *Id.* It also runs afoul of "'the fundamental principle of judicial restraint that courts should [not] anticipate a question of constitutional law in advance of the necessity of deciding it.'" *In re Guardianship of Chamberlain*, 2015 ME 76, ¶ 9 n.4, 118 A.3d 229.

Additionally, "the impact of the initiated legislation" is often unclear before it goes into effect. *Wagner*, 663 A.2d at 567. Courts are loath to speculate about the "ramifications" of proposed initiatives, "because 'to express a view as to the future effect and application of proposed legislation would involve [courts] at least indirectly in the legislative process,' in violation of the separation of powers." *Id.*

2. To the extent that claims are cognizable pre-election, it is only those that address "procedural or subject matter limitations" unique to the ballot initiative process. James D. Gordon & David B. Magleby, *Pre-Election Judicial Review of Initiatives and Referendums*, 64 Notre Dame L. Rev. 298, 313 (1989). *See* (A. 21 n.7.)[5] Crucial for present purposes, "a subject matter limitation" is *not* "a general

[5] We refer to Gordon & Magleby in part because most of the out-of-state cases Avangrid invoked below relied on the article as authoritative.

substantive prohibition." Gordon & Magleby, *supra*, at 316. Rather, these are limitations that "appear in the constitutional provision or statutory section that authorizes direct legislation" or otherwise "simply exclude initiatives from certain subject matters." *Id*. at 316-317. By contrast, "general constitutional or statutory restrictions that ban all laws which have a specified effect (such as laws abridging the freedom of speech) are general substantive prohibitions, not subject matter limitations." *Id*. at 317. In other words: Prior to an election, only those claims specific to the ballot initiative process may possibly be cognizable.

Maine law reflects precisely this distinction. *Wagner* evaluated whether a ballot initiative satisfied the subject matter limitations contained in *Section 18*—that is, whether it was a "bill, resolve, or resolution." Me. Const. art. IV, pt. 3, § 18, cl. 1. There, the plaintiffs sought to keep an initiative off the ballot, alleging it was "an attempt to amend the Constitution in direct violation of section 18." *Wagner*, 663 A.2d at 566-567. The Court reached that argument and rejected it: "*On its face*, the proposed initiative legislation is not a constitutional amendment." *Id*. at 567 (emphasis added). Rather, the initiative "identifie[d] itself as a statutory enactment." *Id*. For this reason, "[t]he proposed initiative legislation does not present [the Court] with a subject matter beyond the electorate's grant of authority." *Id*. This language is about the scope of *Section 18*. (A. 8-9 (describing *Wagner*).)

From there, *Wagner* rejected any further review. It specifically declined to address "the future effect, enforceability, and constitutionality of the initiative if enacted." *Wagner*, 663 A.2d at 567.

And, as the Superior Court carefully canvassed, other cases further confirm

this rule. Claims that go to "substantive invalidity" may not be brought—only those claims addressing whether "procedures specified in the Constitution are directly inconsistent with the procedure for initiative or referendum." (A. 20).

Opinion of the Justices, 159 Me. 209, 213-215, 191 A.2d 357, 359-360 (1963), addressed the super-majority requirement for submitting a bond issuance to voters, a specific procedural impediment to the ballot initiative process. (A. 20.) In *Morris v. Goss*, 147 Me. 89, 93, 105-109, 83 A.2d 556, 559, 565-567 (1951), the Court found that the "people's veto" was not available for emergency tax legislation, because the Maine Constitution "exempts emergency legislation from the referendum process." *Opinion of the Justices*, 370 A.2d 654, 669 (Me. 1977). In *Moulton v. Scully*, 89 A. 944, 952-955 (Me. 1914), the Court found that the people's veto did not extend to the Legislature's power to initiate the constitutional process to remove public officers; the proposal was neither "a law nor [] a proposed law, but [is] rather in the nature of a complaint in a criminal proceeding."

By contrast, as the Superior Court held, the claims brought here are "substantive challenges." (A. 21.) They go to the scope of the legislative authority *generally*: Avangrid would bring these same claims even if the Legislature passed the law. These claims are thus not "subject matter" claims, but are instead claims asserting a "general substantive prohibition." Gordon & Magleby, *supra*, at 316.

Below, Avangrid tried to skirt this problem by asserting that, if a proposal would violate certain generally applicable constitutional rules (*e.g.*, if a proposal violates the separation of powers doctrine), it ceases to be a "bill, resolve, or resolution"—and accordingly is outside the "subject matter" of Section 18. *See* (Avan-

grid Super. Ct. Reply 3-4.) This argument is incorrect. It would cause an exception to swallow the generally applicable rule that substantive challenges must await the election. It would contradict *Wagner*, which held that review is limited to whether the action is "[o]n its face" outside Section 18—and not whether the proposal would "*in effect*" be beyond the category of a "bill, resolve, or resolution." 663 A.2d at 567. And, indeed, the Court has already observed that "[t]he initiative proposed the adoption of a legislative resolve." *Reed*, 2020 ME 57, ¶ 2, __ A.3d __. Finally, this argument makes little sense: If Avangrid were right that the proposed Resolve is unconstitutional (to be sure, Avangrid is wrong), that would render it an *unconstitutional* resolve. It would not cease being a *resolve*.[6]

Lockman v. Sec'y of State, 684 A.2d 415 (Me. 1996), already rejected this sort of maneuver. There, parties attempted to challenge, pre-election, a competing measure to a ballot initiative, arguing that it violated the Constitution's requirement that a super-majority legislative vote is necessary to alter the use of public lands. *Id.* at 420. Reaffirming *Wagner*, the Court held that this pre-election constitutional challenge was not ripe because the measure "may not be approved." *Id*. Relevant here, the nature of the structural challenge in *Lockman*—whether the proposed legislation infringed the Legislature's super-majority rights—is similar in kind to the separation-of-powers arguments advanced in this case. And, like here, the argument was improper prior to the election. *Id.*

3. The Court need not look beyond Maine law to resolve this case. (A. 18

[6] Avangrid's assertion that the Initiative is not a resolve at all is made all the more implausible by the fact that, last year, the Legislature *did* enact a resolve directing the PUC to take specific action in a specific docket. Resolves 2019, ch. 87 (attached as an addendum to this brief). We discuss this in more detail below. *See infra* p. 26. The Initiative is a resolve, regardless of its constitutionality.

n.5.) But if it does so, out-of-state authority confirms these rules.

Alaska Action Center, Inc. v. Municipality of Anchorage, 84 P.3d 989 (Alaska 2004)—on which Avangrid relied below—held that appropriate pre-election challenges are those that "invoke[] 'the particular constitutional and statutory provisions *regulating initiatives*.'" *Id.* at 992 (emphasis added). Inappropriate pre-election challenges, by contrast, "are grounded in 'general contentions that the provisions of an initiative are unconstitutional.'" *Id.* This latter category includes only claims that "would not depend on whether [the measure] was enacted by initiative or by the legislature." *Id.* Ultimately, courts may entertain, pre-election, just those claims that go "directly to the use of the initiative process itself," "rather than to the propriety of the [law] itself, even if passed by the legislature." *Id.* at 993.[7]

Courts across the country broadly make the "distinction between substantive constitutional challenges to an initiative which do not become justiciable until the proposal is approved by voters and procedural challenges to the legal sufficiency of an initiative petition which may be determined prior to an election." *Stewart v. Advanced Gaming Techs., Inc.*, 723 N.W.2d 65, 76 (Neb. 2006); *see also, e.g.*, *Hughes v. Hosemann*, 68 So. 3d 1260, 1265 (Miss. 2011) ("Pre-election challenges of voter-initiative proposals are subject only to the review of the sufficiency of the petition itself (i.e., its form) and not its constitutionality (i.e., its substance)."); *Winkle*, 949 P.2d at 505 ("Prior to passage, this court will consider only procedural defects in form that bear directly on the integrity of the election process.").

[7] *Alaska Action Center* consistently defined "subject-matter limitations on initiatives" as "provisions that set out topics that may not be legislated by the ballot process." 84 P.3d at 993. One such "example," was article XI, Section 7 of the Alaska Constitution, which provides, among other things that the "initiative shall not be used to dedicate revenues" or "create courts." Alaska Const. art. XI, § 7.

Courts routinely reject the sort of claims asserted here, which would effectively "eliminate [the] rule against preelection review and open the floodgates to preelection challenges of nearly any proposed initiative." *Coppernoll v. Reed*, 119 P.3d 318, 325 (Wash. 2005). Allowing such review would not just "infringe upon the constitutional rights of the people, but it would needlessly inject [the] courts into a political dispute that is time sensitive." *Id*. Just as the courts do not "substantively review the legislature's bills before enactment," courts "will not do so with the people's right of direct legislation." *Id*. *Coppernoll* rejected a "separation of powers" argument lodged against a ballot initiative, *id*. at 323, as it was "abundantly clear that [the] claim as to the scope of the legislative power is a pretext for a challenge to the possible constitutionality" of the proposal. *Id*. at 325.

In sum, *Wagner* accords with the law of other states: Pre-election challenges are limited to issues unique to ballot initiatives. Because Avangrid's claims would be identical if the legislature itself passed this law, they do not go to limits on the *initiative* power. The claims are not now ripe.

C. Whatever the scope of cognizable pre-election challenges, Section 22 imposes a time limitation on their resolution.

For the foregoing reasons, Avangrid's claims are premature prior to the election. But there is an even simpler way to resolve this case—*whatever* the proper scope of pre-election challenge may be, Section 22 imposes a sharp limitation on the time for resolving those claims, precisely to avoid late-breaking challenges casting uncertainty on elections. Instead of deciding whether these claims are within or without the cognizable scope of a pre-election challenge, the Court may simply recognize that, regardless, it is too late to bring challenges to a ballot initiative.

The Constitution provides that "[t]he Legislature may enact laws not inconsistent with the Constitution to establish procedures for determination of the validity of written petitions." Me. Const. art. IV, pt. 3, § 22. "Such laws shall include provision for judicial review of any determination, to be completed within 100 days from the date of filing of a written petition in the office of the Secretary of State." *Id*. The Legislature has established expedited procedures to allow review to occur in this short window. *See* 21-A M.R.S. § 905(2), (3).

In this way, Section 18 and Section 22 work hand-in-glove. Section 22 establishes the procedures to assess "the validity of written petitions." And Section 18 provides that, if validated, the "measure . . . shall be submitted to the electors." To the extent there is any pre-election challenge cognizable, it must be one going to the "validity" of the "written petition" itself.[8]

This result, moreover, stems from the policy evident on the face of Section 22—challenges to ballot initiatives must be resolved promptly, well before the election. This orderly policy would be obliterated if, as Avangrid claims, broad-ranging challenges to an initiative's constitutionality can be brought *at any time*.

Because the petition was filed with the Secretary on February 3, 2020, *Reed*, 2020 ME 57 ¶ 7, ___ A.3d ____, the 100-day window closed on May 13.[9]

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[8] Below, Intervenor Industrial Energy Consumer Group argued that the scope of challenges to the "validity" of a written petition is circumscribed by Section 20, and thus "[a] review of 'the validity of written petitions'—defined in the Constitution itself in a way that focuses on their form, not their substance—does not extend to the constitutionality of the substantive measure the written petition would enact." (IECG Super. Ct. Reply Br. 13.) But this is *our* point: The Constitution provides express textual evidence of *what* challenges are permissible pre-election. And if Avangrid's challenges are outside the scope of Section 22, they are outside the scope of what may be brought pre-election.

[9] Once the Secretary issued a determination, all constitutional claims going to the validity of the petition became "subsumed" in the Rule 80C appeal of that decision. *See Cape Shore House Owners Ass'n v. Town of Cape Elizabeth*, 2019 ME 86, ¶ 8, 209 A.3d 102. Avangrid could have participated—and Reed, its subsidiary's former employee, represented by Avangrid's counsel, did participate—in that appeal. So

Avangrid has said that it could not bring this claim earlier. We agree in one sense—it cannot bring these claims *at all* prior to the election. But if we are wrong about that, nothing stopped Avangrid from filing this lawsuit several months ago.

D. Necessary parties are absent.

If enacted, the Initiative would direct the PUC to rescind a CPCN it issued to CMP. But neither the PUC nor CMP are present here. Avangrid—by suing the Secretary—may not litigate a hypothetical, future dispute between CMP and the PUC. When litigation challenges the issuance of a permit, "the person to whom the permit was issued" is a "necessary party." *Centamore v. Comm'r, Dep't of Human Servs.*, 634 A.2d 950, 951 (Me. 1993). These necessary parties must be present "so that any relief that may be awarded will effectively and completely adjudicate the dispute." *Peoples Heritage Bank v. Grover*, 609 A.2d 715, 716 (Me. 1992). And, "[i]f joinder of a directly interested party is possible, then joinder is mandatory." *Ocwen Fed. Bank, FSB v. Gile*, 2001 ME 120, ¶ 21, 777 A.2d 275. The absence of the PUC and CMP is yet more reason to deny these claims.[10]

II. The Initiative Is Constitutional.

If the Court reaches the issue, it should conclude that the Initiative is constitutional. Via a ballot initiative, the people exercise the "plenary legislative power" of this State. *League of Women Voters v. Sec'y of State*, 683 A.2d 769, 771 (Me. 1996); Me. Const. art. IV, pt. 3, § 18, cl. 1. The relevant question, therefore, is

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too did IECG and the Maine Chamber. Yet no one brought these claims then. In fact, because the parties are sufficiently identical, *Reed* should resolve this issue as a matter of *res judicata*.

[10] The inclusion of necessary parties is so central to an action that this Court may raise "the issue *sua sponte*," even when the parties have not argued the point. *Centamore*, 634 A.2d at 951. The inclusion of the PUC, moreover, is far from academic. Below, Avangrid urged the court to adopt a reading of *Verizon N.E., Inc. v. Pub. Utils. Comm'n*, 2005 ME 16, ¶ 11, 866 A.2d 844, inconsistent with the PUC's interpretation. *See infra* p. 31 & n.17, Such issues should not be resolved without the PUC present.

whether the Legislature has the power to direct specific actions at the PUC. It does, a conclusion supported by decades of specific authority from this Court, statute, and legislative practice.

It is important to bear in mind what this lawsuit is *not*. Avangrid asserts no claim sounding in due process, equal protection, or vested rights. The extent to which these doctrines—or any other—preclude legislative action is not at issue.

The Initiative "carries a heavy presumption of constitutionality, and the burden of overcoming that presumption rests on the challenger." *League of Women Voters*, 683 A.2d at 771. Thus, "[b]efore legislation may be declared in violation of the Constitution, that fact must be established to such a degree as to leave no room for reasonable doubt." *Id.* at 771-772. Avangrid cannot carry that burden here.

A. The Initiative properly exercises the State's legislative authority.

1. The people's authority to act via ballot initiative is coextensive with the legislative authority.

The Maine Constitution provides that "[t]he electors may propose to the Legislature for its consideration *any* bill, resolve or resolution." Me. Const. art. IV, pt. 3, § 18, cl. 1 (emphasis added). Per this text, there is no subject matter on which the Legislature can pass a law, but the people, acting by initiative, cannot. The Court has thus held that "[t]he exercise of initiative power by the people is simply a popular means of exercising the *plenary* legislative power 'to make and establish all reasonable laws and regulations for the defense and benefit of the people of th[e] State.'" *League of Women Voters*, 683 A.2d at 771 (quoting Me. Const. art. IV, pt. 3, § 1); *see also Farris*, 60 A.2d at 910.

Ultimately, the relevant question is whether the *Legislature* has the power to

enact the Initiative. If it does, the people do, too. Avangrid appears to agree. *See* (Avangrid Super. Ct. Reply 6 & n.5.)

In *Friends of Congressional Square Park v. City of Portland*, 2014 ME 63, 91 A.3d 601, the Court addressed a different question—the scope of a city code, which authorized initiatives on a "proposed ordinance dealing with legislative matters on municipal affairs." *Id*. ¶ 8 (quoting Portland, Me. Code § 9-36(a)). *Friends* thus considered the "'legislative/administrative' distinction" that may be relevant when "considering municipal or county initiatives." (A. 21.) Because municipal entities may blend administrative and legislative functions, courts may need tools to distinguish legislative acts from "day-to-day operations." *Friends*, 2014 ME 63, ¶ 18, 91 A.3d 601; *see also Vagneur v. City of Aspen*, 295 P.3d 493, 504 (Colo. 2013) ("[A]t the municipal level because the governing body of a municipality often wields both legislative and executive powers and frequently acts in an administrative as well as a legislative capacity."). This complication is not present at the State level; the question is only whether the Legislature may take the action.

In the pages that follow, we detail the specific relationship between the Legislature and the PUC, explaining why the Legislature possesses authority to overturn PUC orders. In any event, it bears mention that the general theory described in *Friends* supports the constitutionality of the Initiative. *Friends* held that public "decisions" "making land use choices based on competing policy considerations" are "a task best suited for legislative bodies." *Friends*, 2014 ME 63, ¶ 15, 91 A.3d 601. *Friends* thus rejected the assertion that the proposal to designate "thirty-five properties as land bank properties" was non-legislative merely because the deci-

sion would may be informed by individuals "truly qualified to be making decisions regarding land bank properties." *Id.* ¶ 11. Legislation is likewise appropriate here.[11]

2. The Legislature may overrule actions by the PUC, an entity that exercises delegated legislative authority.

In addressing the scope of the Legislature's authority, the starting point is the governing rule: "The Legislature of Maine may enact any law of any character or on any subject unless it is prohibited, either in express terms or by necessary implication, by the Constitution of the United States or the Constitution of this State." *League of Women Voters*, 683 A.2d at 771. The question, therefore, is not whether the Legislature has the authority to overturn PUC orders. It is whether anything in the Maine Constitution *forbids* the Legislature from doing so. Nothing so disempowers the Legislature. And several specific aspects of Maine law confirm that the Initiative is within the heartland of legislative authority.

Decades ago, the Court explained in *Auburn Water* that "[i]t is well understood that the regulation of public utilities is a function of the Legislature. The regulation of public utilities lies with the Legislature *and not with the Executive or Judiciary*." 163 A.2d at 744 (emphasis added); *see also Mech. Falls Water Co. v. Pub. Utils. Comm'n*, 381 A.2d 1080, 1090 (Me. 1977) ("Regulating public utilities is in the first instance the function of the Legislature."); *Poland Tel. Co. v. Pine*

[11] Ballot initiatives in Maine have previously been used to approve or disallow particular projects:

- Creating a nature preserve in order to block the development of a private ski resort. *See* L.D. 1619, I.B. 1 (107th Legis. 1976); 2 Legis. Rec. S-B1267 (1975) ("The concern here is that Flagstaff Corporation . . . intends to develop [the area] as a ski resort."), https://perma.cc/3B48-E69R.
- Permitting individual casinos. *See* L.D. 1370, I.B. 1 (121st Legis. 2003); L.D. 2261, I.B. 3 (123rd Legis. 2008); L.D. 1808, I.B. 5 (124th Legis. 2010); L.D. 985, I.B. 1 (125th Legis. 2011); L.D. 719, I.B. 1 (128th Legis. 2017).
- Deciding the future of the Maine Yankee nuclear power plant. L.D. 20, I.B. 1 (113th Legis. 1987); *see also* L.D. 20, Summary (113th Legis. 1987) ("The intended effect of this legislation would be to close the Maine Yankee nuclear power station at Wiscasset, Maine."), https://perma.cc/X779-3M7D.

Tree Tel. & Tel. Co., 218 A.2d 487, 489 (Me. 1966) ("The regulation of public utilities is a function of the Legislature.").

The Court has held that the relationship between the Legislature and the PUC is that of principal and agent: "The Legislature . . . placed in the hands of its agents, namely the Commission, broad powers of regulation and control of public utilities." *Auburn Water*, 163 A.2d at 744. Of crucial importance here, the Court held that "[t]he power of the Legislature was not, however, surrendered, but delegated." *Id.*[12] Ultimately, because "[t]he Commission has no life except as life is given by the Legislature," *Auburn Water*, 163 A.2d at 744-745, "the Legislature may limit the power of its agent, the Commission, if it so pleases," *id*. at 745.[13]

That was the core holding of *Auburn Water*. After the Legislature established the PUC and delegated to it the power to regulate public utilities, the Legislature passed an act directly fixing a specific annual rate to be paid by the City of Auburn to its water district. *Id.* at 744-745. The PUC later argued that the Legislature lacked this authority because "the regulation of water districts was placed in its hands" by its organic statute. *Id.* at 745. The Court disagreed: Because "the Legislature may limit the power of its agent, the Commission, if it so pleases," the PUC "must accept the city water rate fixed by the Legislature." *Id.*; *cf. Poland Tel. Co.*, 218 A.2d at 489 ("The delegation of power [to the PUC] was not in 1913, and

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[12] *See also N.E. Tel. & Tel. Co. v. Pub. Utilities Comm'n*, 390 A.2d 8, 57 (Me. 1978) ("The Public Utilities Commission is an administrative body of limited, though extensive, authority, having such powers as are expressly delegated to it by the Legislature."); *Mech. Falls Water Co.*, 381 A.2d at 1090 ("In its wisdom the Legislature delegated its entire authority to regulate and control public utilities to the Public Utilities Commission.").

[13] In reaching this conclusion, the Court turned to its earlier decision in *In re Searsport Water Co.*, 118 Me. 382, 108 A. 452 (1919), which established that "the Legislature had the power to exempt from the general regulatory power" any action undertaken by the PUC. *Auburn Water*, 163 A.2d at 745.

never has been, all-inclusive but limited as the statutes have from time to time provided."). The ultimate authority to regulate public utilities lies with the Legislature.

The concurrent—and supervening—authority of the Legislature over decisions of the PUC is also made plain by the statutory structure. 35-A M.R.S. § 1323 provides that "[n]o public utility may apply to the Legislature to grant it a right, privilege or immunity which the commission has power to grant it *until the utility has exhausted its rights* regarding its request before the commission" (emphasis added).[14] The governing statute thus allows an applicant, unsuccessful before the PUC, to petition the Legislature directly for the relief that the PUC denied. This is decisive evidence that the Legislature may overturn specific PUC actions.

Below, Avangrid responded that Section 1323 allows a party to appeal the *denial* of a license or certificate to the Legislature, whereas the issue here is the *grant* of a license. That distinction makes no difference. *First*, Section 1323 is an exhaustion statute: It channels requests initially to the PUC, prior to reaching the Legislature. In circumstances where the PUC has *granted* a license, the PUC has already acted and there is no need for an express exhaustion requirement.

Second, Section 1323 confirms the inherent relationship between the Legislature and the PUC. While the PUC exercises delegated authority, it is the Legislature that has ultimate control over the any "privilege or immunity which the commission has power to grant." 35-A M.R.S. § 1323.

Third, because the Initiative, if enacted, would *itself* be a piece of legislation, it is not bound by Section 1323. *See League of Women Voters*, 683 A.2d at 771.

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[14] A materially identical provision has been part of the PUC statute since its inception in 1913. *See* P.L. 1913, ch. 129, § 69.

In fact, the Legislature exercised its authority to manage specific actions by the PUC just last year with respect to the Aqua Ventus project. In an action entitled "Resolve, To Require the Approval by the Public Utilities Commission of a Proposal for a Long-term Contract for Deep-water Offshore Wind Energy," the Legislature directly overruled the PUC's decision to reconsider the grant of an offshore energy-supply contract to a particular company, legislatively finding the project to be in "the public interest," and ordering the PUC to approve the contract as originally proposed. Resolves 2019, ch. 87 (attached as an addendum to this brief).

In the course of overruling this specific PUC action, the Legislature expressly reaffirmed that "regulation of public utilities is a function of the Legislature, or a subordinate body, . . . as an attribute of sovereignty," and that "the Legislature's delegation of authority to the Public Utilities Commission may be withdrawn, modified or superseded in whole or in part from time to time . . . by specific legislative act or resolve exercising the Legislature's absolute authority." *Id.* That is just what the Initiative proposes to do here.

More generally, it is non-controversial throughout administrative law that a legislature is free to overrule, through duly enacted legislation, the actions of a legislatively created agency. *INS v. Chadha*, 462 U.S. 919 (1983), addressed a one-House legislative veto mechanism designed to override the Attorney General's decision not to deport certain individuals. The Supreme Court found the veto provision unconstitutional because its *procedure* failed to satisfy the Article I requirements of bicameralism and presentment. The Court observed, however, that the *objective*—overruling decisions made by administrative agencies that exercise dele-

gated authority—was proper. "Congress would presumably retain the power . . . to enact a law, in accordance with the requirements of Article I of the Constitution, mandating a particular alien's deportation." *Id.* at 935 n.8. That is, "Congress *had the power*" to "invalidate a decision by the Attorney General to allow a deportable alien to remain in the United States." *Metro. Wash. Airports Auth. v. Citizens for Abatement of Aircraft Noise*, 501 U.S. 252, 275 (1991) (emphasis added).

As then-Judge Stephen Breyer put it, even where Congress has "delegated unqualified power to the executive . . . Congress could still later enact a special law setting aside an executive action with which it disagreed." Stephen Breyer, *The Legislative Veto after Chadha*, 72 Geo. L.J. 785, 788 (1984). Legislatures may overrule agency determinations in particular cases by duly enacting legislation.[15]

The Legislature's power to enact specific legislation notwithstanding its delegation of authority to the PUC is simply an application of this broadly accepted premise. The Initiative is therefore fully within the legislative power. Indeed, it is hard to imagine a subject more appropriate for the legislative power than determining what is in the "public interest."

B. Avangrid's arguments do not withstand scrutiny.

Avangrid has failed to prove that the Initiative is unconstitutional.

1. The Initiative does not usurp executive authority.

As we just showed, the Initiative proposes to exercise the legislative authority to direct specific actions by the PUC. Not only does this accord with all the spe-

[15] *See also* Cong. Research Serv., R45442 *Congress's Authority to Influence and Control Executive Branch Agencies* 1 (Dec. 19, 2018), available at https://perma.cc/SH7N-8GN6 ("Congress also may … directly counteract, through later legislation, certain agency actions implementing delegated authority."); *id.* at 9 n.71 ("Congress can reverse agency decisions through the enactment of ordinary legislation.").

cific law governing public utility regulation in Maine, but there is nothing unusual—or unconstitutional—about a legislature providing an agency specific direction.

Biodiversity Assocs. v. Cables, 357 F.3d 1152 (10th Cir. 2004), is instructive. The court there considered "legislation applicable to selected sections of the Black Hills National Forest in South Dakota and nowhere else," which, among other things, directed "forest management techniques for these lands in minute detail," the effect of which was to "explicitly supersede[] a settlement agreement between the Forest Service and various environmental groups regarding management of these lands." *Id.* 1156. Plaintiffs argued that the "extreme particularity" of the law "infringe[d] the Executive's power to enforce and execute the law." *Id.* at 1161. The Tenth Circuit disagreed, because Congress is not "required to speak with some minimum degree of generality, so as to leave play for the Executive to exercise discretion in interpreting the law." *Id*. Indeed, so long as Congress respects the rights of regulated parties—claims not implicated here in the absence of CMP or the PUC such as vested rights or "[d]ue process and equal protection principles," *id*. at 1162—"Congress may be as specific in its instructions to the Executive as it wishes." *Id*. The rule that governed *Biodiversity Associates* applies with full force here: "To give specific orders by duly enacted legislation in an area where Congress has previously delegated managerial authority is not an unconstitutional encroachment on the prerogatives of the Executive; it is merely to reclaim the formerly delegated authority." *Id*.[16]

[16] *See also First Gibraltar Bank, FSB v. Morales*, 42 F.3d 895, 901 (5th Cir. 1995) ("There is simply no infringement on the power of the executive branch when Congress narrows the scope of its delegated authority."); *Stop H-3 Ass'n v. Dole*, 870 F.2d 1419, 1435 n.24 (9th Cir. 1989) ("Appellants have not presented, and we have not found, any authority forbidding Congress to alter a legislative grant of authority by means of new legislation *directed at a particular project*.") (emphasis added).

Biodiversity Associates drew on rich case law in noting "that particularity is especially unproblematic when addressing unique public amenities." 357 F.3d at 1162. The Tenth Circuit observed that "[i]t would be difficult if not impossible to control the use of federal lands without reference to specific actions affecting specific tracts of land, and we see no reason why Congress should be forced to avoid such directives." *Id*. Likewise, the D.C. Circuit found "unobjectionable" "the level of specificity" employed by a law addressing "whether specified government decisions about the [World War II] Memorial complied with prior general legislation." *Nat'l Coal. to Save Our Mall v. Norton*, 269 F.3d 1092, 1097 (D.C. Cir. 2001).

In the end, the judgment whether an enormous public utility project is in the public interest is a textbook example of where legislative particularity is warranted.

Moreover, it is well-settled in Maine that the Legislature can retroactively invalidate permits even after they have been granted by the executive. *City of Portland v. Fisherman's Wharf Assocs. II*, 541 A.2d 160, 164 (Me. 1988); *accord Kittery Retail Ventures, LLC v. Town of Kittery*, 2004 ME 65, ¶ 24, 856 A.2d 1183. And in the public utilities context it is entirely unexceptional for the Maine Legislature to upset seemingly settled expectations of the regulated utilities. *See, e.g.*, 35-A M.R.S. §§ 3201–3217 ("Electric Industry Restructuring"). To be sure, any protections secured by the individual rights of impacted parties—such as due process, equal protection, or vested rights—are outside the scope of this case.

2. The Initiative does not usurp judicial authority.

Avangrid's contention that the Initiative impinges the judicial power fails for three independent reasons: *first*, decisions by the PUC are structurally non-final;

second, the Initiative addresses a public right, not a private claim; and, *third*, the Initiative does not overrule the *NextEra* judgment.

a. Because the PUC has authority to revisit its original issuance of the CPCN, the *Lewis*/*Plaut* doctrine does not apply.

In *Lewis*, the Court explained that the prohibition on legislatively reopening judgments is rooted in "the settlement of [the parties'] rights." *Lewis v. Webb*, 3 Me. 326, 332 (1825). Likewise, in *L.V.I.*, the Court tethered the doctrine to "a *final* judgment" that is "a *decisive* declaration of the rights between the parties." *State v. L.V.I. Grp.*, 1997 ME 25, ¶ 11 n.4, 690 A.2d 960. *Plaut* too turned on the rights having reached "finality." *Plaut v. Spendthrift Farm*, 514 U.S. 211, 227 (1995).

In most cases—like those that address claims for money damages, *see*, *e.g.*, *id.* at 227; *L.V.I.*, 1997 ME 25, ¶ 11 n.4, 690 A.2d 960—the rights among the parties are settled once litigation is over. But not always. And when rights remain subject to later revision, *Lewis* and *Plaut* do not apply.

The Court's twin cases *Morrissette v. Kimberly-Clark Corp.*, 2003 ME 138, 837 A.2d 123, and *Grubb v. S.D. Warren Co.*, 2003 ME 139, 837 A.2d 117, illustrate the point. Those cases addressed the Legislature's retroactive amendment to the formula for calculating worker's compensation benefits. The Court held in *Grubb* that it would violate the separation of powers to recalculate the plaintiff's benefits under the new formula, since those benefits had "been previously established by decree," and—critically—"there had been no change in Grubb's circumstances" that would justify reopening his case under the normal principles applicable to workers' compensation. 2003 ME 139, ¶¶ 10, 12, 837 A.2d 117. In *Morris-*

sette, by contrast, "the employ[ee] *did* establish a change of circumstances and therefore was entitled to a new benefit calculation" pursuant to the existing principles of finality. *Id.* (emphasis added) (citing *Morrissette*, 837 A.2d 123). That is, the employer's *Plaut*-based arguments failed in *Morrissette* because the compensation award was subject to reopening under the applicable legal framework. *See Morrissette*, 2003 ME 138, ¶¶ 12-14, 837 A.2d 123. Here, because the PUC retains authority to revisit—and reverse—the CPCN, this case is *Morissette*, not *Grubb*.

That is, since public utility regulation ultimately serves the public interest, "[t]he Commission has broad authority to rescind, alter, or amend any order it has made." *Verizon N.E., Inc. v. Pub. Utils. Comm'n*, 2005 ME 16, ¶ 11, 866 A.2d 844.[17] The statutory authority is express: "The commission may *at any time* rescind, alter or amend any order it has made." 35-A M.R.S. § 1321 (emphasis added); *see also Mech. Falls Water Co.*, 381 A.2d at 1106 ("[T]he Commission may reopen any prior order") (citing prior version of reopening statute); *Stratton Water Co. v. Pub. Utils. Comm'n*, 397 A.2d 188, 190 (Me. 1979) (statute empowers PUC to amend its orders "upon its own initiative").

Because the issuance of the CPCN for the CMP Corridor lacks the finality

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[17] *Morrissette* involved a structure where the rights were settled unless there was a "change of circumstances." 837 A.2d 123. That was enough to render *Lewis* and *Plaut* inapplicable.

The PUC structure is, at minimum, comparable. However, accurately understood, the structure is even less final, as the PUC can revise orders *regardless* of whether there is a change of circumstances, as *Verizon* establishes. *See* 2005 ME 16, ¶¶ 8, 10, 866 A.2d 844. As Avangrid acknowledged below, (Avangrid Super. Ct. Reply Br. 12 n.10), the PUC itself has taken this position expressly. *See Investigation into Me. Elec. Utils. Transmission Planning Standards & Criteria*, No. 2011-00494, 2019 WL 1506535, at *1 (Me. P.U.C. Apr. 1, 2019) ("The Commission has broad discretion to reopen its own orders when it decides that such action is necessary and in the public interest."). Even if the PUC had to find a sufficient passage of time or other change in circumstances, whether that finding would be reasonable is a question that would be explored only should the Initiative pass, the PUC rescinds the CPCN, and a party challenges *that* action.

that *Lewis* and *Plaut* are designed to protect, those doctrines do not apply.[18]

b. The *Lewis*/*Plaut* framework attaches solely to the resolution of private rights; it does not apply to the sort of prospective public right at issue in the CPCN.

As the Court has explained, *Lewis* and *Plaut* hold that "the Legislature cannot disturb" the "final judgment in a case" that is "a decisive declaration of the rights between the parties." *L.V.I.*, 1997 ME 25, ¶ 11 n.4, 690 A.2d 960. That does not, however, bar the Legislature from adopting legislation governing the prospective application of *public* rights. Such laws "must be given prospective legal effect." *Biodiversity Assocs.*, 357 F.3d at 1165. *See also Morrissette*, 2003 ME 138, ¶ 15, 837 A.2d 123 (*Plaut* does not apply to "prospective" applications).

Thus, when "Congress has authority to enact laws to govern matters of public right, such as the management of the public lands," Congress retains "authority to change those laws." *Biodiversity Assocs.*, 357 F.3d at 1165. That remains true when "the Judiciary has issued a legal judgment enforcing a congressional act." *Id*.

The separation-of-powers analysis turns on whether the law at issue addresses private or public rights. In *Pennsylvania v. Wheeling & Belmont Bridge* Co., 59 U.S. (18 How.) 421, 431 (1855), the Court explained that where "an action at law" results in a "judgment rendered in favor of the plaintiff for damages," "the right to these would have passed beyond the reach of the power of congress." By contrast, a different rule applies to a "public right" that "is under the regulation of congress." *Id*. Because "the plaintiff had no vested property right," *Biodiversity As-*

[18] *Quirion v. Pub. Utils. Comm'n*, 684 A.2d 1294 (Me. 1996), establishes only that private parties bound by PUC "adjudicative decisions" may not "collateral[ly] attack" those decisions in later proceedings. *Id.* at 1296. It does not purport to circumscribe the PUC's *own* authority to rescind its earlier orders.

socs., 357 F.3d at 1165-66, legislation by Congress was permissible. *See Frost v. Washington Cty. R. Co.*, 51 A. 806, 808 (Me. 1901) (discussing *Wheeling Bridge*). "*Wheeling Bridge* has remained a fixed star in the Supreme Court's separation-of-powers jurisprudence." *Biodiversity Assocs.*, 357 F.3d at 1166.

Hodges v. *Snyder*, 261 U.S. 600, 603 (1923), reiterated the general rule: "[T]he private rights of parties which have been vested by the judgment of a court cannot be taken away by subsequent legislation." A very different approach governs for a "public right": "This rule, however, as held in the Wheeling Bridge Case, does not apply to a suit brought for the enforcement of a public right, which, even after it has been established by the judgment of the court, may be annulled by subsequent legislation and should not be thereafter enforced." *Id.*

A "certificate of public convenience and necessity"—which ultimately assesses "the public's needs"—is a quintessential public right. *Bangor Hydro-Elec. Co. v. Pub. Utils. Comm'n*, 589 A.2d 38, 43 (Me. 1991). *See also* 35-A M.R.S. § 3132(6) ("If the commission finds that a public need exists, . . . it shall issue a certificate of public convenience and necessity for the transmission line.").

The CPCN does not confer a private property right:

> A certificate of public convenience and necessity is in the nature of a personal privilege or license, which may be amended or revoked by the power authorized to issue it, and the holder does not acquire a property right. Such certificate is issued for the purpose of promoting the public convenience and necessity, and not for the purpose of conferring upon the holder any propriety interest.

Dennis Melancom, Inc. v. City of New Orleans, 703 F.3d 262, 270 (5th Cir. 2012) (quoting *Hutton v. City of Baton Rouge*, 47 So.2d 665, 668-669 (La. 1950)). *See also Tlingit-Haida Reg'l Elec. Auth. v. State*, 15 P.3d 754, 765 (Alaska 2001) (holding that, because the public utilities commission "could modify or revoke a

certificate of public convenience and necessity," "the certificate grants a utility . . . no vested right against the commission's exercise of this regulatory power").[19]

Because the PUC exercises "continuing supervisory jurisdiction" over the CPCN, its grant "may be altered according to subsequent changes in the law"—consistent with *Lewis* and *Plaut*. *Miller v. French*, 530 U.S. 327, 347 (2000).[20]

c. Finally, the Initiative does not impermissibly infringe on the judicial power because it does not—in any sense—overrule the Court's *NextEra* judgment.

When it applies, the *Lewis* and *Plaut* doctrine holds that the Legislature may not "set aside a judgment or decree of a Judicial Court, and render it null and void[.]" *Lewis*, 3 Me. at 332. This precludes the "legislated invalidation of judicial judgments," *Plaut*, 514 U.S. at 240, or "legislative attempts to overturn final judicial decisions," *L.V.I.*, 1997 ME 25, ¶ 11 n.4, 690 A.2d 960.

On its face, the Initiative does not attempt to vacate or reopen the Court's *NextEra* judgment. *Compare Plaut*, 514 U.S. at 219 (striking down statute that "retroactively command[ed] the federal courts to reopen final judgments" and reinstated previously dismissed lawsuits).

Nor does the Initiative implicitly "invalidat[e]" (*Plaut*, 514 U.S. at 240) or "overturn" (*L.V.I.*, 1997 ME 25, ¶ 11 n.4) the *NextEra* judgment. At the outset, it is important to understand what *NextEra* did—and did not—hold.

The PUC found that the CMP Corridor "is in the public interest," and thus the PUC issued a certificate of public convenience and necessity. (A. 43.) NextEra

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[19] The PUC recognizes it possesses authority to revoke a CPCN. *See Formal Investigation into Hampden Tel. Company's Affiliate Transactions*, No. 92-295, 1994 WL 16963181 (Me. P.U.C. Jan. 19, 1994).

[20] *See also Paramino Lumber Co. v. Marshall*, 309 U.S. 370, 381 (1940) (legislation specifically reversing administrative agency adjudication was not "an excursion of the Congress into the judicial function").

then sought review of that determination in this Court.

The nature of the review in this Court is crucial. In *NextEra*, the Court decidedly did *not* itself assess whether the CMP Corridor is in the "public interest." Rather, the Court found that the conclusion reached by the PUC was "a reasonable exercise of discretion." *Id.* ¶¶ 38, 43.

This is a fundamental aspect of judicial review of administrative agencies. The question is *not* whether the PUC got the CPCN determination *correct*. It is whether the decision was within its discretion. To unpack this, the Court's review of a PUC determination is quite different than its review of a judicial order:

> If this were an appeal from the Superior Court on summary judgment, we would independently review the record to ascertain that summary judgment was appropriate, and we would review questions of law de novo.
>
> When we review decisions of the PUC, however, "we limit our review to determining whether the agency's conclusions are unreasonable, unjust or unlawful in light of the record." "We do not attempt to second-guess the Commission on matters falling within its realm of expertise."

Guilford Transp. v. Pub. Utils. Comm'n, 2000 ME 31, ¶¶ 5, 6, 746 A.2d 910. Ultimately, "[t]h[e] [C]ourt will not substitute its judgment for [the agency's] where there may be a reasonable difference of opinion." *Seven Islands Land Co. v. Maine Land Use Reg. Comm'n*, 450 A.2d 475, 479 (Me. 1982).

Inherent in this standard is the recognition that an agency often has multiple reasonable options before it. Indeed, the very concept of agency discretion contemplates that "the facts and circumstances of the particular case" before an agency will give rise to a range of "reasonable choices" the agency may make; the reviewing court's role is limited to evaluating whether "the [agency] decisionmaker exceed[s] the bounds of the reasonable choices available to it." *Lippitt v. Bd. of Cert. for Geologists & Soc. Scientists*, 2014 ME 42, ¶ 16, 88 A.3d 154.

Selecting among multiple reasonable options is the essence of the PUC's discretion. The Court is not, in its words, "a super-commission." *Pine Tree Tel. & Tel. Co. v. Pub. Utils. Comm'n*, 631 A.2d 57, 61 (Me. 1993). The Court therefore does not resolve whether the PUC decides an issue *correctly*. It resolves whether the PUC acted *reasonably*.

Accordingly, in *NextEra*, the Court simply addressed whether the Commission's decision reflected "a reasonable exercise of discretion." *NextEra*, 2020 ME 34, ¶ 38, 227 A.3d 1117. Because of that deferential standard of review, the Court's conclusion in *NextEra* with respect to the "public need" for the CMP Corridor was only that the PUC's determination was "supported by significant record evidence," and that "the Commission reasonably interpreted and applied the relevant statutory mandates." *Id*. ¶¶ 30, 43. Thus, issuing the CPCN was within the zone of reasonable outcomes. *NextEra* was not a judicial declaration that CMP is *entitled* to a CPCN, or that the PUC was *required* to issue one. In sum, the *NextEra* judgment was recognition that the PUC's issuance of a CPCN did not "exceed[] the bounds of the reasonable choices." *Lippitt*, 2014 ME 42, ¶ 16, 88 A.3d 154.[21]

The Initiative does not invalidate that determination. It nowhere suggests that the *Court's* judgment in *NextEra* was wrong. The Initiative does not, for example, say that the PUC's earlier determination was an abuse of discretion. Rather,

[21] In analogous contexts, courts routinely note Congress's power to override an agency's adjudicatory action, even while upholding that same agency action against legal challenge by the adversely affected parties. *See, e.g.*, *Caal-Tiul v. Holder*, 582 F.3d 92, 96 (1st Cir. 2009) (upholding the Board of Immigration Appeals' (BIA) denial of asylum to a noncitizen, but observing that the resulting "injustice[]" might be "remedied by [a] private bill[] in Congress" granting her relief); *Corragioso v. Ashcroft*, 355 F.3d 730, 734-735 (3d Cir. 2004) (similar). Congress has enacted thousands of private bills in immigration cases, each time overriding the agency's individual determination. *See* U.S. Dep't of Homeland Security, *2003 Yearbook on Immigration Statistics* tbl. 51, at 182 (2004). Per Avangrid, all of this would be unlawful.

the Initiative directs the PUC to exercise its discretion *differently*. It "give[s] specific orders by duly enacted legislation in an area where [the Legislature] has previously delegated managerial authority." *Biodiversity Assocs.*, 357 F.3d at 1162.

Put slightly differently, the *NextEra* judgment (which holds that the PUC did not *abuse* its discretion) is consistent with the Initiative (which directs the PUC to exercise its discretion *differently*). The Initiative, therefore, would not "overturn," *L.V.I.*, 1997 ME 25, ¶ 11 n.4, 690 A.2d 960, the judgment in *NextEra*.

3. The legislative power extends to special laws.

a. Avangrid's argument—that "the Initiative is not legislation" because it "is not generally applicable," (Avangrid Super. Ct. Br. 11),—is nothing less than an attack on special legislation as a whole.[22] But the Court has long held that "special legislation is not per se unconstitutional." *Nadeau v. State*, 395 A.2d 107, 113 (Me. 1978); *see also Gray v. State*, 624 A.2d 479, 481 & n.3 (Me. 1993) ("Special legislation is permissible . . . ."); *Opinion of the Justices*, 402 A.2d 601, 602 (Me. 1979) ("[S]pecial legislation does not constitute a per se violation of the special legislation clause."). In fact, while the Maine Constitution expresses a preference for general laws as opposed to special ones, it necessarily recognizes that special laws are within the legislative authority. *See* Me. Const. art. IV, pt. 3, § 13.

Likewise, the U.S. Supreme Court recently rejected the contention "that legislation must be generally applicable, that 'there is something wrong with particularized legislative action.'" *Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1327 (2016). "While legislatures usually act through laws of general applicability, that is

[22] Maine often enacts special laws. *See* Resolves 2016, ch. 84 (directing State to pay $400,000 to resolve claims stemming from a deadly accident); Resolves 2015, ch. 17 (modifying specific deed).

by no means their only legitimate mode of action." *Id*. (quotation omitted). Thus, "[e]ven laws that impose a duty or liability upon a single individual or firm are not on that account invalid." *Id*. (quotation omitted). Rather, courts routinely uphold "as a valid exercise of Congress' legislative power diverse laws that governed one or a very small number of specific subjects." *Id*. at 1328 (citing several examples).

b. Below, Avangrid focused on the special legislation clause, which provides that "[t]he Legislature shall, from time to time, provide, as far as practicable, by general laws, for all matters usually appertaining to special or private legislation." Me. Const. art. IV, pt. 3, § 13. Under this section, "if a general law is practicable . . . passage of special legislation" is prohibited. *Nadeau*, 395 A.2d at 112.

First, it is not clear that Section 13 applies to the initiative process at all. By its own terms, Section 13 applies only to "the Legislature." Me. Const. art. IV, pt. 3, § 13; *see, e.g.*, *Voorhees v. Sagadahoc Cty.*, 2006 ME 79, ¶ 6, 900 A.2d 733 ("In interpreting our State Constitution, we look primarily to the language used."). By contrast, Section 18 provides that the people may enact "*any* bill, resolve or resolution" through an initiative. Me. Const. art. IV, pt. 3, § 18 cl., 1 (emphasis added). The "word 'any' has an expansive meaning." *Babb v. Wilkie*, 140 S. Ct. 1168, 1173 n.3 (2020). Indeed, the Court has explicitly observed that the initiative power "applies . . . to the making of laws, whether it be a public act, *a private act*, or a resolve having the force of law." *Moulton*, 89 A. at 953 (emphasis added).[23]

[23] The purposes of the special legislation clause reinforce that it is inapplicable to citizen-initiated legislation. "Section 13 was added to stem the enactment of 'special laws for private benefit.' The principal objections of the drafters to the use of special, rather than general, legislation were its susceptibility to 'privilege, favoritism, and monopoly and its tendency to distract the attentions of legislators from matters of public interest.'" *Fitzpatrick v. Greater Portland Pub. Dev. Comm'n*, 495 A.2d 791, 794 (Me. 1985).

The concern about "privilege" and "favoritism" shown to special interests by friendly legislators is entirely absent in the initiative context. No back-room dealings can carry the day when proposed legisla-

Second, and in any event, the Initiative is consistent with Section 13. That provision inquires "whether [the] objective [of the special law] could have been more fully attained through general legislation," *Fitzpatrick*, 495 A.2d at 794, and it is generally "appropriate for the legislature rather than the court to make the policy decision regarding what is practicable in a given situation, *MSAD 6 Bd. of Dirs. v. Town of Frye Island*, 2020 ME 45, ¶ 32, ___ A.3d ___. Here, the Court owes great deference to the people's legislative judgment. And "[g]iven the presumption that legislative acts are constitutional," Avangrid "must offer more than mere speculation that it would have been practicable to enact [the Initiative] as a general public law." *Id.* ¶ 33. But "speculation" is all Avangrid offers. That alone is fatal.

Additionally, the nature of utilities regulation oft requires special legislation. The Court has affirmed the Legislature's authority to fix a particular utility's rates. *Auburn Water*, 163 A.2d at 745 (explaining that the Legislature "ha[s] the power to exempt [individual cases or contracts] from the general regulatory power" of the PUC over utilities). Likewise, "[i]t would be difficult if not impossible to control the use of federal lands without reference to specific actions affecting specific tracts of land, and we see no reason why Congress should be forced to avoid such directives." *Biodiversity Assocs.*, 357 F.3d at 1162.

The Initiative gives further content to the standard contained in section 3132 by making a legislative determination that there is no "public need" for a project that would cut a 145-mile-long swath through Maine forests for the benefit of Massachusetts. 35-A M.R.S. § 3132. And it is hard to see how *that* legislative project

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tion is put directly to the ultimate sovereign—the People—for a public vote. Nor is there any issue of legislators being "distract[ed] . . . from matters of public interest." *Fitzpatrick*, 495 A.2d at 794.

could be accomplished by a general law. If the Initiative were unconstitutional for "exempting" CMP "from the usual operation of 35-A M.R.S. § 3132," then any exercise of legislative power under 35-A M.R.S. § 1323—which expressly contemplates utilities petitioning the legislature for relief that the PUC has *denied*—would be similarly unconstitutional. *See supra* p. 25. That is not the law.

The purpose of the special legislation clause itself reveals why it is inapplicable: It reflects "a judicial vigilance, dating back to the first days of statehood and continuing to the present, against ad hoc legislative attempts to single out certain named individuals for benefits not available to the general citizenry." *Nadeau*, 395 A.2d at 112. But the Initiative does not single out CMP for a special benefit. Rather, it would work to protect the interests of "the general citizenry" by barring an enormous *public* utility project if the *public* deems it not in the *public* interest.[24]

In the final analysis, the Initiative aims to prevent a major, destructive public utility project that will affect a wide cross-section of Maine citizens. Maine law has, for more than a century, featured a powerful mechanism for popular democracy; determining whether a major public works proposal is in the "public interest" is a paradigmatic use of that lawmaking power.

CONCLUSION

The Court should affirm the Superior Court's dismissal of this action. In the alternative, it should enter judgment against Avangrid on all claims.

[24] Avangrid does not bring an equal protection or other challenge asserting CMP's constitutional *rights*; it argues only that the Initiative is beyond the constitutional *power* of the electors. *Cf. Fitzpatrick*, 495 A.2d at 794 (the special legislation clause "is not . . . another equal protection clause").

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CERTIFICATE OF SERVICE

I, Elizabeth C. Mooney, hereby certify that on this 13th day of July, 2020, and with the agreement of all parties, I caused the foregoing Brief to be served on all counsel of record via electronic mail.

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ADDENDUM:
Resolves 2019, ch. 87

APPROVED
JUNE 19, 2019
BY GOVERNOR

CHAPTER
87
RESOLVES

STATE OF MAINE

IN THE YEAR OF OUR LORD

TWO THOUSAND NINETEEN

S.P. 284 - L.D. 994

Resolve, To Require the Approval by the Public Utilities Commission of a Proposal for a Long-term Contract for Deep-water Offshore Wind Energy

Preamble. Whereas, legislative power is defined by limitation, not by grant, and is absolute except as restricted by the Constitution of Maine; and

Whereas, regulation of public utilities is a function of the Legislature, or a subordinate body, in the exercise of the police powers, as an attribute of sovereignty; and

Whereas, the Legislature's delegation of authority to the Public Utilities Commission may be withdrawn, modified or superseded in whole or in part from time to time by the Legislature by specific legislative act or resolve exercising the Legislature's absolute authority; and

Whereas, in 2010, the 124th Legislature enacted An Act To Implement the Recommendations of the Governor's Ocean Energy Task Force, Public Law 2009, chapter 615, finding that development of offshore wind energy projects in the Gulf of Maine is in the public interest; and

Whereas, Public Law 2009, chapter 615, Part A, section 6 directed the Public Utilities Commission to conduct a competitive solicitation for proposals for long-term contracts to supply installed capacity and associated renewable energy and renewable energy credits from one or more deep-water offshore wind energy or tidal energy demonstration projects and further directed the commission to make every effort to effectuate any such project; and

Whereas, on July 9, 2013, the Public Utilities Commission issued a request for proposals for long-term contracts for deep-water offshore wind energy pilot projects; and

Whereas, on August 30, 2013, Maine Aqua Ventus I, GP, LLC submitted a responsive proposal to the Public Utilities Commission in response to the request for proposals; and

Whereas, the Public Utilities Commission evaluated the Maine Aqua Ventus proposal and by orders issued February 13, 2014 and February 19, 2014 in Docket No.

2010-00235 selected Maine Aqua Ventus as the seller to transfer to Central Maine Power Company transmission and distribution capacity and associated energy produced by its deep-water offshore wind energy pilot project, subject to certain terms and conditions, referred to as "the term sheet," set forth in the February 13, 2014 and February 19, 2014 orders; and

Whereas, in its February 19, 2014 order approving the term sheet, the Public Utilities Commission found that Maine Aqua Ventus had satisfied each of the 6 criteria enacted by the Legislature in Public Law 2009, chapter 615, Part A, section 6, subsection 1, paragraphs A to F as prerequisites to ordering a transmission and distribution utility to enter into a long-term contract for the purchase of energy and capacity from Maine Aqua Ventus; and

Whereas, consistent with the terms and conditions set forth by the Public Utilities Commission in its February 2014 orders, Maine Aqua Ventus and Central Maine Power Company negotiated and drafted a long-term contract for capacity and associated energy following a series of meetings involving Maine Aqua Ventus, Central Maine Power Company, the Office of the Public Advocate and commission staff and legal counsel and filed the final draft with the Public Utilities Commission in December 2017; and

Whereas, in January 2018, the Public Utilities Commission delayed the contract's approval and solicited public comment on whether to reconsider the February 2014 orders approving the term sheet; and

Whereas, on June 12, 2018, the Public Utilities Commission decided, despite objections from Maine Aqua Ventus and the great majority of public commenters, to not act on the long-term contract between Maine Aqua Ventus and Central Maine Power Company filed with the commission in December 2017 and by order issued August 6, 2018 reopened the proceeding to reconsider the February 2014 orders; and

Whereas, since 2010, scientists and energy experts in the State and around the world have increasingly concluded that offshore wind will make a major contribution to the expansion of essential renewable energy generation, reducing reliance on fossil fuels and greatly assisting in the transition to a reduced carbon future; and

Whereas, since 2010, offshore wind energy development has rapidly accelerated in southern New England and other states on the Atlantic Coast, with fixed-bottom offshore wind energy projects contracting to deliver thousands of megawatts of power to regional electricity consumers and hundreds of millions of dollars being invested in projects and related onshore logistical and construction support; and

Whereas, the finite locations available for siting fixed-bottom offshore wind energy projects in the State, the United States and much of the world limit such development, creating a clear need for and public interest in the prompt development of cost-effective floating offshore wind energy technology, especially for regions such as the Gulf of Maine that lack the shallow water and sandy ocean floor necessary for fixed-bottom technologies; and

Whereas, in 2019, floating offshore wind energy technology remains essential to the State to reach its carbon reduction goals in a cost-effective manner, to mitigate the destructive warming of the Gulf of Maine and to benefit the economy through becoming an international source of floating offshore wind energy technology and manufacturing; and

Whereas, the Legislature finds that the public interest in prompt action by the State to determine the feasibility of the Maine Aqua Ventus floating offshore wind energy technology in the Gulf of Maine requires that the Legislature make certain findings and require the Public Utilities Commission to order execution of the December 2017 long-term contract between Maine Aqua Ventus and Central Maine Power Company necessary to effectuate the deep-water offshore wind energy pilot project; and

Whereas, the Legislature finds that it is in the best interest of the State to approve the December 2017 long-term contract between Maine Aqua Ventus and Central Maine Power Company as previously negotiated and drafted except with only such revisions as may be commercially necessary in light of the passage of time and the maturation of the offshore wind industry so that the deep-water offshore wind energy pilot project may move forward expeditiously and generate the benefits to the State and its people sought by the Legislature in Public Law 2009, chapter 615 and subsequent legislation; now, therefore, be it

Sec. 1. Findings. Resolved: That, notwithstanding any provision of law to the contrary or prior action or failure to act by the Public Utilities Commission, in order to best and most expeditiously effectuate the policies, goals and mandates set forth in the Maine Revised Statutes, Title 35-A, section 3202, subsection 1 and Title 35-A, section 3404, subsections 1 and 2; complete the competitive solicitation initiated by enactment of Public Law 2009, chapter 615, Part A, section 6; and make every effort to effectuate the Maine Aqua Ventus I, GP, LLC floating deep-water offshore wind energy demonstration project, the Legislature:

1. Finds that based on information filed by Maine Aqua Ventus I, GP, LLC, referred to in this resolve as "Maine Aqua Ventus," and others in the Public Utilities Commission Docket No. 2010-00235 and information otherwise in the public domain regarding the rapid worldwide development of offshore wind energy since 2010 and most recently offshore of the states of Massachusetts, Rhode Island, Connecticut, New York, New Jersey, Maryland and Virginia, including hundreds of millions of dollars of planned investment in onshore logistical support and construction, the Public Utilities Commission correctly concluded in its February 19, 2014 order that Maine Aqua Ventus, referred to in this subsection as "the supplier," had satisfied each of the 6 criteria enacted by the Legislature in Public Law 2009, chapter 615, Part A, section 6, subsection 1, paragraphs A to F, as follows:

A. "Supplier proposes sale of renewable energy produced by a deep-water offshore wind energy pilot project or a tidal energy demonstration project as defined in this RFP";

B. "Supplier has the technical and financial capacity to develop, construct, operate and, to the extent consistent with applicable federal law, decommission and remove

the project in the manner provided by Title 38, section 480-HH, subsection 3, paragraph G";

C. "Supplier has quantified the tangible economic benefits of the project to the State, including those regarding goods and services to be purchased and use of local suppliers, contractors and other professionals, during the proposed term of the contract";

D. "Supplier has experience relevant to tidal power or the offshore wind energy industry, as applicable, including, in the case of a deep-water offshore wind energy pilot project proposal, experience relevant to the construction and operation of floating wind turbines, and has the potential to construct a deep-water offshore wind energy project 100 megawatts or greater in capacity in the future to provide electric consumers in Maine with project-generated power at reduced rates";

E. "Supplier has demonstrated a commitment to invest in manufacturing facilities in Maine that are related to deep-water offshore wind energy or tidal energy, as applicable, including, but not limited to, component, turbine, blade, foundation or maintenance facilities"; and

F. "Supplier has taken advantage of all federal support for the project, including subsidies, tax incentives and grants, and incorporated those resources into its bid price";

2. Finds that the development and operation of Maine Aqua Ventus technology under the long-term contract will:

A. Meet and surpass the substantial economic and professional opportunities and other societal benefits to the State anticipated by the Legislature in Public Law 2009, chapter 615 and subsequent legislation;

B. Provide benefits to providers of supervisory control and data acquisition systems and other monitoring services, systems controls providers, marine and construction engineering firms, marine transport services technology apprenticeship programs and other industries and service providers in the State;

C. Promote the public interest in development of reasonably priced, high load factor, winter-peaking renewable energy at projected and stable rates to serve the State and the regional power grid; and

D. Achieve several public purposes, including creating offshore-wind-related employment in the State, decreasing reliance on fossil fuels and increasing availability of renewable energy, mitigating the destructive warming of the Gulf of Maine and greatly assisting the State in achieving its carbon reduction goals; and

3. Finds that the public interest requires that the State Government maintain consistent, transparent and predictable regulatory processes and that the State Government thus be known to the world to keep its word.

Sec. 2. Maine Aqua Ventus to file draft contract with Public Utilities Commission. Resolved: That, within 15 days of the effective date of this resolve, Maine Aqua Ventus shall file with the Public Utilities Commission a draft revised

contract, which must be the same as the contract filed with the commission on December 13, 2017, in Docket No. 2010-00235, except for revisions necessary for the purposes of updating the previously negotiated contract in light of the passage of time and the maturation of the industry and facilitating the financing, construction and operation of the demonstration project in current circumstances.

Sec. 3. Contract negotiations; final draft contract. Resolved: That, within 60 days after the filing of the draft revised contract under section 2, the Public Utilities Commission shall initiate and complete negotiations among commission staff, Maine Aqua Ventus, Central Maine Power Company and the Office of the Public Advocate and shall approve a final draft contract. The final draft contract must be the same as the contract filed with the commission on December 13, 2017, in Docket No. 2010-00235, except for revisions necessary for the purposes of updating the contract in light of the passage of time and the maturation of the industry and facilitating the financing, construction and operation of the demonstration project in current circumstances, within the cost limitations established in Public Law 2009, chapter 615, while not increasing or decreasing the annual energy production cap or, except as needed to reasonably accommodate for construction inflation costs since 2014, the cost per kilowatt-hour previously set in the base energy price.

Sec. 4. Contract executed between Maine Aqua Ventus and Central Maine Power Company; cost recovery. Resolved: That, within 90 days of the effective date of this resolve, the Public Utilities Commission shall order the final draft contract approved under section 3 to be executed by Maine Aqua Ventus and Central Maine Power Company. The commission shall permit a transmission and distribution utility that it has directed to enter into a long-term contract under this section to recover the full cost of the purchases made under that contract in appropriate rate-making proceedings.

Sec. 5. Project monitoring; contract amendments. Resolved: That the Public Utilities Commission shall monitor the deep-water offshore wind energy pilot project developed by Maine Aqua Ventus and shall advise and consult with the parties to the project with regard to the exploration, assessment and implementation of all commercially reasonable actions to accomplish the objectives of Public Law 2009, chapter 615 through the financing, construction and operation of the demonstration project. The commission shall approve requested amendments to the contract executed under section 4 between Maine Aqua Ventus and Central Maine Power Company that are reasonably designed to accomplish the objectives of Public Law 2009, chapter 615 and to facilitate the financing and operation of the deep-water offshore wind energy pilot project as Maine Aqua Ventus may request from time to time, except that an amendment to the contract may not modify the annual energy production cap or, except as needed to reasonably accommodate for construction inflation costs since 2014, the cost per kilowatt-hour set in the base energy price under the contract.

Sec. 6. Authority for legislation. Resolved: That the Joint Standing Committee on Energy, Utilities and Technology may report out a bill relating to deep-water offshore wind energy to the Second Regular Session of the 129th Legislature.